HIGH COURT OF AUSTRALIA

30 March 2012

BETFAIR PTY LIMITED v RACING NEW SOUTH WALES & ORS

[2012] HCA 12

Today the High Court dismissed an appeal from the Full Court of the Federal Court of Australia, which had held that approvals given to Betfair Pty Limited ("the appellant") by Racing New South Wales and Harness Racing New South Wales ("the respondents") to use race field information for wagers, but only upon payment of fees to the respondents, were validly granted under the *Racing Administration Act* 1998 (NSW) ("the Racing Act"). The High Court heard this appeal concurrently with that in *Sportsbet Pty Ltd v State of New South Wales* [2012] HCA 13.

The appellant is the only betting exchange operator located in Australia. It provides wagering services in respect of various events, including horse races, by operation of a betting exchange call centre and internet server system located in Tasmania. Through its betting exchange, the appellant receives wagers from anywhere in Australia. As a betting exchange operator, the appellant only accepts a wager on an event or contingency if it can match that bet with one or more opposing wagers (that the event or contingency would not occur, also known as a "back bet"). A different form of wagering service is "totalizator" betting, by which the wagers of all punters on the same event or contingency are pooled together. By totalizator betting, when the outcome is known, the operator deducts a commission and the remainder of the pool is divided among the successful punters. In New South Wales, TAB Limited is the monopoly off-course totalizator wagering operator.

Section 33 of the Racing Act makes it an offence for a wagering operator to use information regarding horse races held in New South Wales, unless approval has been granted and the operator complies with conditions to which the approval is subject. Pursuant to s 33A of the Racing Act, each of the respondents (as a "racing control body" within the meaning of that provision) granted the appellant approval to use such information subject to the condition that it pay certain fees. Under Pt 3 of the Racing Administration Regulation 2005 (NSW) ("the Regulations"), the fees were calculated by reference to the appellant's "wagering turnover". Wagering turnover was defined to mean "the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races".

The appellant challenged the validity of the fee conditions. The basis of the appellant's challenge was that the fee conditions imposed a burden or disadvantage on interstate trade and commerce, contrary to s 92 of the Constitution. The appellant contended that the legal and practical effect of the fees was to protect New South Wales wagering operators, particularly TAB Limited, from competition from wagering operators in other States. This effect was said to result from the calculation of the fees as a percentage of the amounts wagered on back bets, which would have a higher financial impact on the appellant than on other wagering operators, such as TAB Limited.

A single judge of the Federal Court declared that the approvals granted by the respondents were valid and found that, although the fees discriminated against the appellant in favour of certain other wagering operators, the fees were not protectionist in nature, and therefore did not infringe s 92 of

the Constitution. The Full Court dismissed an appeal by the appellant. The appellant appealed, by special leave, to the High Court of Australia.

The High Court dismissed the appeal, with the result that the approvals given by the respondents, conditioned upon the payment of the fees, are valid. The High Court emphasised that the focus of s 92 of the Constitution is upon the effect of a law on interstate trade, not on particular traders. The fees were imposed uniformly on both interstate and intrastate wagering operators. The High Court held that the appellant had not demonstrated that the fee conditions imposed a discriminatory burden of a protectionist kind upon interstate trade. Further, a majority of the Court held that the appellant did not demonstrate that the likely practical effect of the imposition of the fees would be loss to it of market share or profit, or to impede it from increasing that share or profit. Accordingly, the High Court rejected the contention that s 92 of the Constitution was engaged.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*